

# Pregnancy Discrimination and Parental Leave

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*The decline of the single-breadwinner family in the United States has affected every level of the workforce. Conflicting demands faced by working parents (and expectant parents) have, in turn, created pressures on employers to accommodate their employees' child-birth and child-rearing responsibilities. The 1978 federal Pregnancy Discrimination Act has spawned a host of rules and regulations affecting hiring, promotion, termination, medical coverage, and unemployment insurance. The PDA may soon be supplemented by national parental leave legislation. State courts and legislatures have jumped into the fray, in some cases requiring employers to adopt policies protecting the seniority and security of employees whose family obligations require time away from their jobs. This Article surveys the developing legal landscape of pregnancy discrimination (and the related, frequently contradictory issue of fetal protection), and sheds some light on the current debate regarding the wisdom and effects of proposed federal parental leave legislation.*

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#### INTRODUCTION

During the last two years, the issues of pregnancy discrimination

and parental leave have reached the forefront of national attention. In January 1987, the Supreme Court upheld against a Title VII challenge a California law requiring pregnancy disability leave with guaranteed job reinstatement.<sup>1</sup> The past two years also have seen the introduction of congressional bills that would provide parental leave to new parents of either sex and additional job protected leave in other special circumstances.

This paper surveys the many questions employers and employees alike face when an employee or the spouse of an employee becomes pregnant. Emphasis is placed on emerging federal law, both existing and proposed. First, an overview of pregnancy discrimination law will identify the legal issues involved with various employment practices including hiring, benefits, leaves of absence, termination and fetal protection policies. Second, state law treatment of pregnancy discrimination is discussed, with emphasis on unemployment compensation and leaves of absence. Finally, proposed federal and California parental and disability leave legislation is described.

In order to best understand the issues presented in this paper, it is important to remember that maternity leave is conceptually distinct from parental leave. Maternity leave refers to a type of disability or sick leave, applies only to mothers of natural born children and is described as a "leave taken by female employees to cover the period of their own actual physical inability to work as a result of pregnancy, childbirth, or related medical conditions."<sup>2</sup>

In contrast, parental or child rearing leave describes a leave taken in preparation for the birth or adoption of a child, or for child care, and does not involve a medical disability. Accordingly, parental leave applies to both male and female employees. As this paper explains, Title VII problems will arise if this distinction is not clearly confronted.

## I

### ENACTMENT OF THE 1978 PREGNANCY DISCRIMINATION ACT

Historically, women employees faced a range of adverse consequences when they became pregnant. They were forced either to resign or be discharged from workplaces that offered no pregnancy leave, or they were subjected to an imposed mandatory unpaid leave during pregnancy and for a period of time after childbirth.<sup>3</sup> In 1978, Congress

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1. *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272 (1987).

2. BUREAU OF NATIONAL AFFAIRS, PREGNANCY AND EMPLOYMENT: THE COMPLETE HANDBOOK ON DISCRIMINATION, MATERNITY LEAVE, AND HEALTH AND SAFETY 21 (1987) [hereinafter BNA Handbook] (quoting from the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION COMPLIANCE MANUAL § 626.5).

3. See Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 FORDHAM L. REV. 699, 706 (1986). See generally Finley, *Transcending Equality Theory: A Way Out of the Maternity*

passed the Pregnancy Discrimination Act (PDA) to amend Title VII of the Civil Rights Act of 1964.<sup>4</sup> The Title VII definition of sex discrimination was broadened to include discrimination on the basis of pregnancy. Section 701(k) of Title VII now provides:

The terms "because of sex" or "on the basis of sex" include but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.<sup>5</sup>

The legislative history of the PDA plainly indicates that it was not intended as a change in Title VII, but as a clarification.<sup>6</sup> The legislation was passed as a direct response to the Supreme Court's decision in *General Electric Co. v. Gilbert*.<sup>7</sup> In *Gilbert*, an employer's disability plan which provided non-occupational sickness and accident benefit coverage but excluded from coverage pregnancy-related disabilities was challenged under Title VII as being sexually discriminatory. The Court upheld under Title VII General Electric's health insurance plan, concluding that the pregnancy classification was not sex-based since not all women were likely to become pregnant.

By defining sex discrimination to include discrimination on the basis of pregnancy, Congress in effect overruled the *Gilbert* decision<sup>8</sup> and intended to ensure that pregnancy-based distinctions would be subject to the same scrutiny as other sex-based distinctions.

#### A. *The PDA Requires Equal, Not Preferential, Treatment*

The Pregnancy Discrimination Act requires employers to treat pregnancy-related disabilities in the same manner as other disabilities. Thus, women disabled by pregnancy must be provided with the same benefits given to other disabled workers, including short and long term disability insurance, sick leave, and other employee benefits. The PDA does not,

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and the Workplace Debate, 86 COLUM. L. REV. 1118 (1986); Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929 (1985); Johnson, *The Legal Background and Implications of Pregnancy Benefits*, 35 LABOR L.J. 352 (June 1984).

4. Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e (k) (1982)).

5. 42 U.S.C. § 2000e (k) (1982)).

6. See, e.g., H.R. Rep. No. 948, 95th Cong., 2d Sess. 55, reprinted in 1978 U.S. Code Cong. & Admin. News 4749, 4750; 123 CONG. REC. 29,655 (1977) (Statement of Sen. Javits) ("What we are doing is leaving the situation the way it was before the Supreme Court decided the *Gilbert* case last year"); 124 CONG. REC. 21,436 (1978) (Statement of Rep. Sarasin) ("This bill would restore the interpretation of Title VII prior to that decision. . .").

7. 429 U.S. 125 (1976). Vacated, *Hillsdale College v. Department of Education*, 466 U.S. 901 (1984).

8. See *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, at 277.

however, require employers to provide pregnant employees with disability insurance or other employee benefits where none exist for other employees. The PDA only prohibits discriminatory treatment; it does not afford pregnant women preferential treatment over other disabled workers.

### B. *The Judiciary Interprets the PDA*

Since 1978, there has been a predictable explosion of cases interpreting and applying the PDA to a seemingly endless variety of facts. The cases deal primarily with pregnancy as it relates to hiring, employee benefits, leaves of absence, reinstatement, seniority rights, termination of employment and fetal protection policies.

#### 1. *Hiring Practices*

Under the PDA it is plainly unlawful for an employer to exclude an applicant from employment because of pregnancy. An employer risks liability under Title VII for asking a female job applicant questions about marriage and pregnancy if the same questions are not asked of male applicants.<sup>9</sup>

Employers do have some latitude, so long as all employees are treated equally. An employer may lawfully refuse to hire a pregnant applicant who will not be on the payroll long enough to accrue significant sick leave and vacation time to cover her planned four- to eight-week leave of absence following childbirth when the employer would not hire any applicant who planned to interrupt his or her employment for that amount of time before completion of his or her training.<sup>10</sup>

Of course, proving that an employer's rejection of a pregnant applicant was not pregnancy-related becomes a difficult task.<sup>11</sup> For example,

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9. *King v. Trans World Airlines, Inc.*, 738 F.2d 255, 258 (8th Cir. 1984).

10. *Marafino v. St. Louis County Circuit Court*, 537 F. Supp. 206 (E.D. Mo. 1982), *aff'd per curiam*, 707 F.2d 1005, 1007 (8th Cir. 1983).

11. In PDA cases, the standards and burdens of proof are the same as in other Title VII cases of sex discrimination and are based either on a theory of disparate treatment or disparate impact. *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543, 1547 (11th Cir. 1984); *Scherr v. Woodland School Community Consolidated District*, 867 F.2d 974 (7th Cir. 1988).

Disparate treatment cases involve an employer who has allegedly engaged in intentional or "facial" discrimination by adopting a policy which explicitly treats some employees differently than others and proof of discriminatory intent or animus is required. *Hayes*, 726 F.2d at 1547. A plaintiff establishes a prima facie case of sex discrimination based on a theory of disparate treatment by showing that: (1) she was a member of the protected class, (2) she applied for and was qualified for a job for which the employer was seeking applicants, (3) she was rejected despite her qualifications, and (4) the position remained open after her rejection and the employer continued to seek applicants from persons of complainant's qualifications. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (setting forth factors for racial discrimination). The burden of production, though not of persuasion, then shifts to the employer to show that a legitimate, nondiscriminatory reason exists which justifies the practice. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 703 (8th Cir. 1987). The plaintiff in turn must prove that the employer's nondiscriminatory reason is pretextual. *Id.*

in *Beatty v. Chesapeake Center, Inc.*,<sup>12</sup> the Fourth Circuit recently considered whether there was sufficient evidence to affirm a judgment for an employer who had rescinded an employment offer to a pregnant woman during the orientation process. There was sufficient proof to find the employer's excuse credible when it had sincerely misinterpreted the employee's statement that she "would not want" to take further tests for tuberculosis as meaning that she would not comply with state law.

## 2. *Employee Benefits Under the PDA*

The PDA prohibits discrimination on the basis of pregnancy, childbirth or related medical conditions with respect to employee benefits, including "health insurance coverage and other fringe benefits [which] are 'compensation, terms, conditions, or privileges of employment.'" <sup>13</sup> The benefits should be provided in the same manner to pregnant employees as provided to non-pregnant employees.<sup>14</sup> However, the PDA does not require that a benefits program be instituted if no such program exists.<sup>15</sup>

### a. *Health Insurance*

The overriding principle when dealing with medical and disability benefits is that women affected by pregnancy-related conditions must be treated in the same manner as other persons not so affected but similar in their ability or inability to work.<sup>16</sup> If that principle is followed, and can

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However, no violation of Title VII will be found if the employer can show that the practice relates to a bona fide occupational qualification (BFOQ). 42 U.S.C.A. § 2000e-2(e).

In disparate impact cases, the employer's policy is facially neutral but the plaintiff seeks to prove that the policy has a significant adverse impact on members of a protected group under Title VII. *Chambers*, 834 F.2d at 700. An employer may counter a showing of disparate impact by showing an affirmative defense of "business necessity." *Id.* at 701. However, a plaintiff may rebut a business necessity defense by showing the employer had other less discriminatory practices available to achieve the business objectives. *Id.*

12. 835 F.2d 71 (4th Cir. 1987) (en banc).

13. *EEOC v. South Dakota Wheat Growers Association*, 683 F.Supp. 1302, 1303 (N.D.S.D. 1988) (quoting *Newport News Shipbuilding and Drydock Co. v. EEOC*, 462 U.S. 669 (1983)).

14. *See, e.g., EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 355 (7th Cir. 1988) (discriminatory policy was found in Sears Personnel Manual, which provided one day of paid leave to a male employee when his wife gave birth but failed to provide a similar benefit to a female employee when she gave birth; however, plaintiff failed to establish prima facie case when no proof was presented of policy's implementation).

15. BNA Handbook, *supra* note 2, at 22.

16. *See, e.g., Hillesland v. Paccar, Inc.*, 722 P.2d 1239 (Or. App. 1986). A female employee brought an action under Title VII and Oregon state law alleging sex discrimination because the package of benefits she, as a married female employee, received was less comprehensive than the package of benefits the married male employee received. The employer's health insurance policy provided coverage for maternity expenses throughout the pregnancy to wives of male employees regardless of whether it extended for more than three months after the husband's termination, but did not provide maternity coverage for female employees after three months following termination of their employment. Such policy was found discriminatory.

be proven, an employer should not be held liable under Title VII. This rule can have broader consequences than many employers may realize.

The Supreme Court's first decision interpreting the PDA, *Newport News Shipbuilding & Drydock Co. v. EEOC*,<sup>17</sup> provides an example of the broad application of the PDA to health insurance plans. In *Newport News*, the court invalidated a health insurance plan that provided less extensive pregnancy-related benefits to the spouses of male employees than female employees.<sup>18</sup> In that case, a shipbuilding company sought to overturn EEOC guidelines requiring companies to provide the wives of male employees the same health insurance benefits provided to female employees. The company had provided full pregnancy benefits to its female employees but only limited coverage to its male employees' pregnant spouses.

The Court held that the company's plan violated Title VII by discriminating against male employees, who received less comprehensive insurance benefits than did their female counterparts. The Court reasoned that since the PDA makes clear that discrimination based on pregnancy is, on its face, discrimination based on sex, and since a spouse's sex is opposite the employee's sex, discrimination against female spouses in the provision of fringe benefits is discrimination against male employees.<sup>19</sup> On remand, the *Newport News* trial court gave the Supreme Court's decision retroactive effect by ordering payment of pregnancy benefits to all male workers whose wives had been denied benefits.<sup>20</sup>

### *b. Abortion Benefits*

The EEOC has taken the position that an employer may exclude coverage for abortion from its health insurance benefits without violating

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17. 462 U.S. 669 (1983).

18. *Id.*

19. See also *EEOC v. Wooster Brush Company Employees Relief Association*, 727 F.2d 566, 574 (6th Cir. 1984) (company held liable under Title VII for knowingly participating in an independent fringe benefit plan that failed to provide maternity benefits for spouses); *EEOC v. South Dakota Wheat Growers Association*, 683 F.Supp. 1302 (N.D.S.D. 1988) (post-employment conversion health insurance policy was discriminatory when pregnancy-related conditions were excluded from coverage for spouses of male employees).

20. *EEOC v. Newport News Shipbuilding & Dry Dock Co.*, 33 Empl. Prac. Dec. (CCH) ¶ 34,108 (E.D. Va. 1983). See also *EEOC v. Puget Sound Log Scaling and Grading Bureau*, 752 F.2d 1389 (9th Cir. 1985) (*Newport News* applied retroactively when court held an employer liable under Title VII for amending its health insurance policy to cover pregnancy-related expenses but continuing to exclude spouses of male employees after the passage of the PDA); *EEOC v. Vucitech*, 842 F.2d 936 (7th Cir. 1988) (*Newport News* applied retroactively by court which found a benefits program discriminatory because maternity benefits for male employees' spouses were less than benefits provided to female employees). Accord *EEOC v. Texas Industries, Inc.*, 782 F.2d 547 (5th Cir. 1986); *EEOC v. Atlanta Gas Light Co.*, 751 F.2d 1188 (11th Cir. 1985), *cert. denied*, 474 U.S. 968 (1985); *Schiffman v. Cimarron Aircraft Corp.*, 615 F. Supp. 382 (W.D. Okla. 1985); *EEOC v. MTC Gear Corp.*, 595 F. Supp. 712 (N.D. Ill. 1984).

Title VII.<sup>21</sup> Health insurance, however, must be provided for abortions if "the life of the mother would be endangered if the fetus were carried to term" or where "medical complications," such as excessive hemorrhaging, result from an abortion.<sup>22</sup>

The EEOC regulations regarding abortions have been challenged by employers whose religious beliefs preclude them from providing insurance coverage even in cases where the mother's life was endangered. In *National Conference of Catholic Bishops v. Bell*,<sup>23</sup> a federal court held that no violation of the PDA or the EEOC guidelines can occur until an employee actually demands and is denied benefits for an abortion under circumstances falling within the EEOC's guidelines.<sup>24</sup>

### 3. *Pregnancy-Related Leaves of Absence*

Under the PDA, the general rule for handling maternity/pregnancy leaves of absence is the same rule applied to all other issues: pregnancy must be treated in the same manner as other temporary disabilities.<sup>25</sup> It is also unlawful to deny a pregnant woman voluntary leave, including vacation time and personal leave without pay, that would otherwise be available to a non-pregnant employee who wished to take a voluntary leave for a valid reason.<sup>26</sup>

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21. 29 C.F.R. § 1604.10(b) (1988).

22. *Id.*

23. 490 F.Supp. 734 (D.D.C. 1980), *aff'd*, 653 F.2d 535 (D.C. Cir. 1981).

24. *See also* National Education Association of Rhode Island v. Garrahy, 598 F.Supp. 1374 (D.R.I. 1984), *aff'd*, 779 F.2d 790 (1st Cir. 1986) (holding Rhode Island statutes prohibiting municipalities and private insurance companies from providing abortion benefits except in narrow circumstances do not violate Title VII but are an unconstitutional invasion of privacy).

25. *See* Maddox v. Grandview Care Center, Inc., 780 F.2d 987 (11th Cir. 1986) (employer held liable where pregnancy leave limited to three months when leave due to other illnesses not so limited); Greenspan v. Automobile Club of Michigan, 495 F. Supp. 1021 (E.D. Mich. 1980) (Title VII violation where everyone but pregnant females on leave allowed to use vacation or sick leave before termination). *Cf.* Vuyanich v. Republic National Bank, 24 Fair Empl. Prac. Cases (BNA) 128 (N.D. Tex. 1980) (no disparate impact found where employer limited all disability leaves to employees with at least six months of service); Wunning v. Johnson, 499 N.Y.S.2d 272, 114 A.D.2d 269 (3d Dept. 1986) (pregnant police officer was not discriminated against when transferred instead of being allowed to receive sick leave benefits when no medical evidence regarding actual disability was offered).

26. *See* Scherr v. Woodland School Community Consolidated District, 867 F.2d 974 (7th Cir. 1988) (plaintiff school teachers stated a cause of action based on both disparate impact and disparate treatment where their school districts' leave policies prohibited combining paid sick leave with unpaid maternity leave, thus forcing plaintiffs to choose between paid sick leave for a period of disability or unpaid maternity leave for the entire period of leave); *cf.* West Hempstead Union Free School District v. State Division of Human Rights, 497 N.Y.S.2d 721, 116 A.D.2d 642 (2d Dept. 1986) (no discrimination found where employer "requir[ed] pregnant teacher to choose either to take unpaid maternity leave for an extended period of time, regardless of actual disability, or to take a paid sick leave for perhaps a shorter period of time during which the condition of pregnancy actually results in the inability to report to work" since maternity leaves were granted in same manner as other extended leaves of absence).



For example, in *EEOC v. AT&T Technologies, Inc.*,<sup>27</sup> a district court recently ruled that employees on maternity leave should be compared with employees on paid leaves of absence for temporary sickness or disability and not compared with employees on unpaid leaves of absence. The court noted, however, that the maternity condition itself could not be easily classified with other conditions related to disability leave or long-term leave. Nonetheless, the court suggested that, because pregnancy is temporary, "it is more appropriate to examine not the nature of the condition itself but rather the nature of the policies affecting all employees."<sup>28</sup>

*a. Mandatory Maternity Leaves*

Generally speaking, an employer cannot force a female employee to go on maternity leave as long as she is still able to work.<sup>29</sup> An employer may prevail in its defense of such policies, however, by proving business necessity.

In order to prevail on a business necessity defense, an employer should be prepared to demonstrate that there is a compelling, nonroutine need to maintain an employment practice that is reasonably necessary to a safe and efficient job performance.<sup>30</sup>

Although the standard appears straightforward, employers often find it difficult to anticipate what facts will satisfy the business necessity test. Different conclusions on similar facts within the airline industry provide a case in point. In *Harriss v. Pan American World Airways*,<sup>31</sup> the

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27. 45 Fair Empl. Prac. Cases (BNA) 568, 45 Empl. Prac. Dec. (CCH) ¶ 37, 692 (N.D. Ill. 1987).

28. *Id.* at 575, 45 Empl. Prac. Dec. (CCH) at 50,5133.

29. *See* *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643 (8th Cir. 1987) (pregnant employee who had to refrain from pushing and lifting without assistance was placed on unpaid leave of absence; court held Title VII violation since plaintiff could still perform her job without difficulty); *EEOC v. Old Dominion Security Corp.*, 41 Fair Empl. Prac. Cases (BNA) 612 (E.D. Va. 1986) (*prima facie* case of pregnancy discrimination where pregnant guard given involuntary layoff, then terminated); *Fields v. Bolger*, 723 F.2d 1216 (6th Cir. 1984) (mandatory maternity leave upheld where employer concerned that plaintiff could not perform lifting and she had availed herself of the option of requesting light duty); *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199 (3rd Cir. 1975) (maternity leave policy requiring termination of employees not returning by earlier of six months after commencement of leave or three months after delivery violated Title VII where no other disability carried this requirement); *cf.* *Langley v. State Farm Fire and Casualty Co.*, 644 F.2d 1124 (5th Cir. 1981) (an employer's flexible policy of allowing employees to return to work within 60 days or when doctor certifies the employee as able to resume work was upheld.)

30. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 701 (8th Cir. 1987) (employer successfully established a business necessity defense by showing that policy of banning single parent pregnancies was justified based on employer's fundamental purpose). *See also* *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543, 1547 (11th Cir. 1984) (affirmative defense of business necessity is available to an employer in cases where the employee has demonstrated that an employer's policy appears to be neutral but has a disproportionate impact on a protected group under Title VII). *See* discussion on affirmative defenses, *supra* note 11.

31. 649 F.2d 670 (9th Cir. 1980).

Ninth Circuit upheld a "stop work" policy requiring pregnant employees to put themselves on unpaid maternity leave within twenty-four hours of learning of pregnancy. Pan American considered failure to comply voluntary resignation. Although the plaintiffs proved a prima facie violation of Title VII, the court accepted the customer-safety defense advanced by the airline.<sup>32</sup> In contrast, on facts similar to those above other courts have rejected the airline's proffered business necessity defense.<sup>33</sup>

Employers that ground their defense of mandatory leave policies in social values or "moral attitudes" toward pregnancy face similar difficulty in predicting the outcome. For example, one court found a violation of Title VII in an action brought by a teacher who had been forced to take a leave of absence when she became pregnant while unmarried.<sup>34</sup> The district court held that her interest in bearing her child out-of-wedlock outweighed the school district's concern that a pregnant, unmarried teacher would have a deleterious effect on the school children.

On the other hand, another court recently found that a girls' club did not violate Title VII when it instituted a policy forbidding continued employment of single persons who become pregnant or caused pregnancy.<sup>35</sup> The Eighth Circuit found the policy, referred to as the "role model rule," to be a legitimate attempt by a private service organization to attack the significant societal problem of teenage pregnancy and found it was related to the club's central purpose of fostering growth and maturity of young girls. The court upheld this rule based on both a business necessity and a bona fide occupational qualification (BFOQ) defense.<sup>36</sup>

Employers *may* fare better when the challenged mandatory leave is

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32. See also *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994 (5th Cir. 1984) (holding Delta's inability to predict which pregnant flight attendants might be overcome with fatigue, nausea or spontaneous abortion justifies the airline's blanket exclusion of pregnant persons from flight duty); *Burwell v. Eastern Airlines*, 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) (mandatory grounding of flight attendants upheld as business necessity); *De Laurier v. San Diego Unified School District*, 588 F.2d 674 (9th Cir. 1978) (court held requiring leave beginning no later than ninth month of pregnancy was a valid business justification).

33. See, e.g., *In re National Airlines, Inc.*, 434 F. Supp. 249, 262 (S.D. Fla. 1977), *aff'd*, 700 F.2d 695 (11th Cir. 1983) (no justification for automatic grounding during first two trimesters); *MacLennan v. American Airlines, Inc.*, 440 F. Supp. 466 (E.D. Va. 1977) (unjustified rule: prior to twenty-sixth week no mandatory leave permitted); *Newmon v. Delta Airlines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973) (unjustified rule that ground employees automatically required to take maternity leave after fifth month of pregnancy).

34. *Ponton v. Newport News School Board*, 632 F.Supp. 1056 (E.D. Va. 1986); see also *Jacobs v. Martin Sweets Co.*, 550 F.2d 364 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977) (Title VII violation where unmarried, pregnant executive secretary demoted to clerk).

35. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987).

36. See also *Harvey v. YWCA*, 533 F. Supp. 949 (W.D.N.C. 1982) (discharge of pregnant, unwed, black youth counselor was not race or sex discrimination when she expressed intent to violate agreement to espouse YWCA's social philosophy); *Wardlaw v. Austin School District*, 10 Fair Empl. Prac. Cas. 892 (BNA) (W.D. Tex. 1975) (transfer of unmarried pregnant teacher to non-teaching position not violation of Title VII).

aimed at protecting the health of the pregnant employee and fetus rather than protecting third parties. For example, the Fifth Circuit suggested in dictum that a mandatory leave of absence with guaranteed reinstatement might be appropriate where a fetus was potentially endangered by a pregnant woman's mere presence in a work place containing a reproductive hazard.<sup>37</sup>

*b. Reinstatement After Maternity Leave*

Absent a state statute providing preferential treatment, an employee returning after pregnancy leave must be reinstated in the same manner as any other person returning after a temporary disability.<sup>38</sup> Many courts have applied this rule to uphold a pregnant employee's right to return to the same or substantially similar job.

In *Goss v. Exxon Office Systems Company*,<sup>39</sup> for example, an employer was found to have constructively discharged a female sales representative in violation of Title VII. The company had given the employee the option to resign or to transfer to a less lucrative sales territory when she returned from maternity leave after a miscarriage. Similarly, in *Garner v. Wal-Mart Stores, Inc.*,<sup>40</sup> the court found constructive discharge when an employer demoted the plaintiff after pregnancy leave and intentionally made her working conditions so intolerable that she was forced to resign. The employee received a dissimilar and lesser position contrary to language in the Wal-Mart handbook that a person granted a leave of absence can be expected to return to his or her place of employment "in a similar capacity."<sup>41</sup>

In *Desira v. Consolidated Marketing Inc.*,<sup>42</sup> a court held an employer had unlawfully terminated a female employee during her pregnancy leave when it refused to permit her to wait four days to obtain her doctor's permission to return to work. The court noted the employer's leniency

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37. *Zuniga v. Kleberg County Hospital*, 692 F.2d 986, 994 (5th Cir. 1982). For further discussion of reproductive hazards and pregnancy see Section *I.B.5., infra*.

38. See *McGonigal v. Lavelle Aircraft Co.*, No. 86-6730, 1987 U.S. Dist. LEXIS 6039, 1987 WL 13505 (E.D. Pa. July 7, 1987) (prima facie claim of sex discrimination established by plaintiff who was laid off after maternity leave, but employer successfully defended with proof that consolidation of jobs was one of many legitimate, non-discriminatory reasons for layoff); *Mahoney v. Dayton Walther Corp.*, 861 F.2d 721 (table — unpublished disposition) text in WESTLAW, 1988 U.S. App. LEXIS 14628, No. 87-6222 (6th Cir. Oct. 31, 1988) (reorganization of staff and implementation of anti-spousal policy were found to be legitimate, non-discriminatory reasons for failure to reinstate female employee to former position); *Garis v. Stouffer Corp.*, No. C84-3921, 1988 U.S. Dist. LEXIS 6008, (N.D. Ohio June 6, 1988) (plaintiff fails to prove prima facie case when not reinstated after maternity leave, since no other similarly situated employees suffering from a temporary disability received more favorable treatment); *Allen v. Montgomery County, Ala.*, 788 F.2d 1485 (11th Cir. 1986); *EEOC v. Western Electric Co.*, 28 Fair Empl. Prac. Cas. (BNA) 1122 (N.D.N.C. 1982).

39. 747 F.2d 885 (3rd Cir. 1984).

40. 807 F.2d 1536 (11th Cir. 1987).

41. *Id.* at 1538.

42. 41 Fair Empl. Prac. Cas. (BNA) 494 (N.D. Ga. 1986).

toward persons with other disabilities, which included extending their leaves if necessary. Similarly, in *Alvarez v. Simmons Market Research Bureau, Inc.*,<sup>43</sup> a plaintiff established a prima facie case of discrimination arising from her employer's failure to reemploy her following maternity leave. The employer claimed that its decision not to reemploy the plaintiff following maternity leave was based on the plaintiff's failure to comply with an employment policy requiring pregnant employees to return to work within sixty days of delivery. The plaintiff was able to prove that the employer's apparently casual and expedient treatment of her as a pregnant employee was a discriminatory departure from its normal practice.

### c. *Seniority Rights and Leaves of Absence*

Employers may not deny the seniority rights of employees on maternity leave unless they apply the same policy to any employee on personal or temporary disability leave of absence from employment.<sup>44</sup> It is permissible, however, to terminate the accrual of seniority on the date on which the employee was physically capable of returning to work following childbirth, so long as the same policy applies to other disabilities.<sup>45</sup>

### 4. *Termination of Pregnant Employees*

An employer may terminate a pregnant employee for poor performance, or other legitimate reasons, although the employer must have convincing proof that the termination was not pregnancy-related. In *Mazzella v. RCA Global Communications*,<sup>46</sup> an employee discharged after she announced her pregnancy brought suit against her employer under Title VII. The court found that plaintiff was discharged for poor performance and not because she was pregnant where she had been warned about performance problems before she ever notified superiors of her pregnancy.<sup>47</sup>

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43. 41 Fair Empl. Prac. Cas. (BNA) 561 (S.D.N.Y. 1986).

44. See, e.g., *Burton v. School Comm. of Quaboag Regional School Dist.*, 13 Mass. App. Ct. 989, 432 N.E.2d 725 (1982) (no seniority accrual during any leave held nondiscriminatory).

45. See, e.g., *EEOC v. Western Electric Co.*, 28 Fair Empl. Prac. Cas. (BNA) 1122 (M.D.N.C. 1982) (employer made good faith attempt to provide seniority for time during which an employee was actually disabled by pregnancy); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (employers may not single out employees with pregnancy related disabilities for adverse treatment).

46. 642 F. Supp. 1531 (S.D.N.Y. 1986) *aff'd*, 814 F.2d 653 (2d Cir. 1987).

47. The court further held that RCA's policy of requiring pregnant employees to disclose their pregnancy did not violate Title VII even though it treated them differently from other employees who expected to become disabled. The court reasoned that (1) the policy did not on its face distinguish between pregnant and non-pregnant employees; (2) the policy did not force pregnant employees to disclose their pregnancies, but merely requested they do so in confidence in order to assist the employer with work force planning; and (3) no penalty was imposed on employees who failed to disclose pregnancy and later took disability leave.

See also *Monroe-Lord v. Hytche*, 668 F. Supp. 979, 999 (D. Md. 1987) *aff'd*, 854 F.2d 1317

In *Eblin v. Whirlpool Corporation*,<sup>48</sup> however, the court upheld plaintiff's discharge for excessive absenteeism and unreliability where the employer counted each day of maternity leave as a day of absence for purposes of computing excessive absences. The court ruled that the employer's policy treated all long-term leaves of absence equally and the employee failed to show that the employer's absence policy was a pretext for discrimination. Male employees who had been retained despite periods of absenteeism were found not to be similarly situated and to have improved their attendance records.<sup>49</sup>

### 5. *Fetal Vulnerability Issues*

Title VII's requirement that women not be discriminated against because of their ability to bear children creates numerous problems for em-

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(4th Cir. 1988) (prima facie case of pregnancy discrimination against assistant professor rebutted where professor had previously been denied tenure and had a contract that expired automatically); *Todhunter v. Cullman County Comm'n on Education*, 665 F. Supp. 890, 906 (N.D. Ala. 1987) (prima facie case of pregnancy discrimination against teacher rebutted where employer decided not to recommend rehire one month before employee knew she was pregnant); *Bowen v. Valley Camp of Utah, Inc.*, 639 F. Supp. 1199 (D. Utah 1986) (termination of pregnant employee on leave justified because of poor job performance); *Iodice v. Southeastern Packing & Gaskets, Inc.*, 572 F. Supp. 1370, 1377 (N.D. Ga. 1983) (employee terminated while pregnant failed to show pretext); *Nichols v. Electronic Crystals Corp.*, No. 87-2381-0, 1988 U.S. Dist. LEXIS 14786 (D. Kan. Dec. 19, 1988) (termination of pregnant employee justified because of excessive absenteeism); *Arehart v. Western Air Lines, Inc.*, 47 Fair Empl. Prac. Cas. 251 (C.D. Ca. 1988) (termination of pregnant employee justified because of staff reductions based on financial reasons); *Barrash v. Bowen*, 846 F.2d 927, 930 (4th Cir. 1988) (discharge based on unauthorized absence was lawful because employee failed to return after extended maternity leave in violation of her settlement agreement).

48. 36 Fair Empl. Prac. Cas. (BNA) 1632 (N.D. Ohio 1985).

49. *But cf. Beck v. Quiktrip Corp.*, 708 F.2d 532 (10th Cir. 1983) (discharge for insubordination, misconduct and absenteeism held pretextual); *Tamimi v. Howard Johnson Co.*, 807 F.2d 1550 (11th Cir. 1987) (terminating plaintiff for wearing makeup held pretextual where rule implemented same day plaintiff advised of pregnancy, rule applied only to plaintiff and she had been told not to wear makeup previously without consequence); *Ensor v. Painter*, 661 F. Supp. 21 (E.D. Tenn. 1987) (employer violated Title VII by discharging two pregnant waitresses who were able to perform their duties at time of discharge, even though neither was an ideal employee); *EEOC v. Red Baron Steak Houses*, 47 Fair Empl. Prac. Cas. 49 (N.D. Ca. 1988) (termination of pregnant waitress and co-worker constituted Title VII violation, and employer's excuses were found pretextual in light of restaurant manager's statement that a pregnant woman who waited on tables "looks tacky"); *Gammon v. Precision Eng. Co.*, 44 Emp. Prac. Dec. (CCH) ¶ 37,327 (D. Minn. 1987) (discharge for unsatisfactory performance held pretextual where the timing and procedure of employee's performance review were suspect and where employer offered to rehire employee seven months later; court rejected employer's contention that receptionist job was a "key position" that could not be filled by a temporary employee); *Packard-Knuison v. Mutual Life Ins. Co.*, 668 F. Supp. 1261 (N.D. Iowa 1987) (discharge pretextual where employer did not begin to complain about employee's lack of production until she was on maternity leave); *Haley v. Lone Star Web, Inc.*, 45 Empl. Prac. Dec. (CCH) ¶ 37,798 (N.D. Tex. 1987) (court finds constructive discharge of pregnant employee: employer's excuses pretextual); *Lunsford v. Leis*, 686 F. Supp. 181 (S.D. Ohio 1988) (sheriff's office violated PDA when it terminated female employee on maternity leave because of a failure to return to work within thirty days after birth of child although employee provided proof of disability); *Suarez v. Illinois Valley Community College*, 688 F. Supp. 376, 381-82 (N.D. Ill. 1988) (summary judgment on Title VII claim precluded when factual dispute existed as to when employer decided to terminate pregnant employee).

ployers with hazardous work areas. On one hand, an employer who employs women in hazardous work areas runs the risk of being held liable on a variety of theories, including negligence, for workplace damage caused to an unborn child. On the other hand, an employer who excludes women from a given workplace runs the risk of violating Title VII.

a. *Employers Must Prove Business Necessity*

An employer's policy of excluding women from positions requiring contact with toxic substances, although presenting a prima facie case of sex discrimination under Title VII, can sometimes be justified as a business necessity.

In one of the most detailed cases on the subject, *Wright v. Olin Corp.*,<sup>50</sup> the Fourth Circuit held that "under appropriate circumstances an employer may, as a matter of business necessity, impose otherwise impermissible restrictions on employment opportunity that are reasonably required to protect the health of unborn children of women workers against hazards of the workplace."<sup>51</sup>

In analyzing Olin's fetal vulnerability policy, which restricted female access to jobs requiring contact with toxic chemicals, the *Wright* court laid down guidelines for employers wishing to justify their fetal protection policies. First, "the burden of persuasion is upon the employer to prove that significant risks of harm to the unborn children of women workers from their exposure during pregnancy to toxic hazards in the workplace make necessary" the restrictions that apply only to fertile women, and that the program of restriction meets that need. Second, the burden of persuasion "may not be carried by proof alone that the employer subjectively and in good faith believed its program to be necessary and effective for the purpose," but must be supported by "the opinion evidence of qualified experts in relevant scientific fields." Third, the employer, while not required to show a consensus within the scientific community, must "show that within that community there is so considerable a body of opinion that significant risk exists, and that it is substantially confined to women workers, that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one."<sup>52</sup> In turn, this prima facie case of business necessity can be rebutted by proof that there are other acceptable policies or practices that would better protect against the risk of harm, or lessen the differing impact between male and female workers.<sup>53</sup>

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50. 697 F.2d 1172 (4th Cir. 1982).

51. *Id.* at 1189-90.

52. *Id.* at 1190-91.

53. Compare *American Cyanamid Co. v. Oil, Chemical and Atomic Workers Int'l Union*, 459 U.S. 905 (1982), in which the Supreme Court denied an employer's petition to review a decision by a

The possibility of infertility also has been deemed a valid defense under state law. In *Steele v. B.F. Goodrich Co.*,<sup>54</sup> an administrative law judge for the Illinois Human Rights Commission determined that an employer's policy of prohibiting fertile women between the ages of sixteen and fifty from holding positions involving exposure to vinyl chloride was not unlawful and that such a requirement constituted a bona fide occupational qualification (BFOQ). The ALJ found that the company had reasonable cause to believe "that there is an extreme danger that if a pregnant woman were exposed to significant levels of vinyl chloride, the child [will] develop cancer subsequent to birth." The ALJ found that the company adopted the policy "in order to protect unborn fetuses from developmental abnormalities at the time when they are most vulnerable and at a time when the female employee is unlikely to know that she is pregnant." The ALJ thus ruled that infertility is a bona fide occupational qualification for such jobs involving exposure to toxic substances.

Employers are far from assured, however, that a business necessity defense will shield them from liability in this setting. The California Department of Fair Employment and Housing recently declined to follow the analysis of *Wright v. Olin*. The Commission in *DFEH v. Globe Battery*<sup>55</sup> held that an employer discriminated against a woman on the basis of sex when it refused to hire her into a lead battery production job. The company had a "Fetal Protection Program" that banned all fertile women applicants from such jobs.

The Commission first rejected the employer's BFOQ defense, holding that such a defense could not be applied to a policy that addressed concern for the potential harm to fetuses and not to female workers. The Commission then stated that the "business necessity" defense was unavailable to the employer because the protection program discriminated overtly. The "business necessity" defense was found to be applicable only in cases of disparate impact, i.e., where a facially neutral employment policy had a disproportionate impact on members of a protected group under Title VII.<sup>56</sup>

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federal appeals court that allowed a suit by a union to continue against the company, challenging its requirement that women of childbearing age prove they are infertile in order to remain on production jobs that involve exposure to toxic substances. The union had sought judicial review of an Occupational Safety and Health Review Commission decision upholding the employer's policy. The appeals court had concluded, contrary to the company's contentions, that permitting such suit by the union did not interfere with the administration of the Occupational Safety and Health Act by the Secretary of Labor. See *Oil, Chemical and Atomic Workers Int'l Union v. Occupational Safety and Health Review Comm'n*, 671 F.2d 643 (D.C. Cir. 1982).

54. Illinois Human Rights Comm'n, No. 1980 CF 0617 (Nov. 17, 1982), as reported in *Bureau of Nat'l Affairs Daily Labor Report*, No. 243, at A-11 (Dec. 17, 1982).

55. FEHC Dec. No. 83-83 (Aug. 4, 1987).

56. See also *International Union v. Johnson Controls, Inc.*, 680 F. Supp. 309 (E.D. Wis. 1988) (Title VII not violated by employer's fetal protection policy, which excluded women from the employer's battery-making operations since substantial risk of harm to the unborn children of women

b. *Case Study: Pregnant X-Ray Technicians May Not Be Terminated to Protect Fetuses*

In two recent cases the courts have held that hospitals discriminated against female x ray technicians by terminating them because they were pregnant.

In *Zuniga v. Kleberg County Hospital*,<sup>57</sup> an appellate court held that a Texas hospital violated Title VII by requiring a pregnant x-ray technician to resign her position out of a purported concern for the fetus, rather than allowing her to take a disability leave given to other employees. The court concluded that the hospital's "unwritten policy requiring pregnant x ray technicians to resign or be terminated without any guarantee of reinstatement deprives them of employment opportunities in the most clear-cut fashion imaginable, by permanently taking away their jobs."<sup>58</sup>

Similarly, in *Hayes v. Shelby Memorial Hospital*,<sup>59</sup> the Eleventh Circuit recently affirmed an award of damages to a pregnant x-ray technician who claimed that her dismissal pursuant to a hospital's fetal protection policy violated the PDA. The Eleventh Circuit went beyond *Zuniga* in the limits it imposed on employer defenses in fetal protection cases. The court suggested that it would be extremely difficult for an employer to argue that a facially discriminatory fetal protection policy was justified on the basis of a bona fide occupational qualification. The court held "that when a policy designed to protect employee offspring from workplace hazards proves facially discriminatory, there is, in effect, no defense, unless the employer shows a direct relationship between the policy and the actual ability of the pregnant or fertile female to perform her job."<sup>60</sup>

The *Hayes* court further suggested that it will be difficult for employers to defend the dismissal of a pregnant employee in disparate impact cases, even when the employer is entitled to use the broader business necessity defense. The court found that the *Hayes* plaintiff successfully rebutted the employer's business necessity defense by demonstrating that the hospital failed both to establish that the employee was likely to be exposed to meaningful levels of radiation and to consider acceptable alternatives, such as her reassignment or the rearrangement of duties within the department to minimize radiation exposure.<sup>61</sup>

It is plain from cases such as *Hayes* and *Zuniga* that an employer

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workers was found and no alternative policies exist; disparate impact claim was rebutted with "business necessity" defense based on the employer's legitimate business concern for the safety of unborn children and threat of future lawsuits).

57. 692 F.2d 986 (5th Cir. 1982).

58. *Id.* at 991.

59. 726 F.2d 1543 (11th Cir. 1984).

60. *Id.* at 1549.

61. *Id.* at 1553-54. See also *Bureau of Nat'l Affairs Daily Labor Report*, EEOC Decides Forced



carries the burden of proving substantial risk of harm to potential offspring of women employees from exposure to toxic hazards in the workplace. An employer who has shown a substantial risk of harm should be prepared to further demonstrate that the restrictions were necessary and effective, that the hazard does not apply to male employees as well, and that no less onerous action was reasonably available.

The Seventh Circuit reached a similar conclusion in *International Union, UAW v. Johnson Controls, Inc.*<sup>62</sup> The court of appeals emphasized that the plaintiff bears the burden of persuasion (regarding the reasonableness of the restriction) under the recent Supreme Court decision in *Wards Cove Packing Co. v. Antonio*.<sup>63</sup>

Applying the *Wards Cove* revision of burdens of persuasion, the court in *Johnson Controls* concluded that plaintiffs in a fetal protection case have three tasks. First, plaintiffs must produce evidence of "specific economically and technologically feasible alternatives" to the challenged exclusion. Second, plaintiffs must prove that the proposed alternatives are equally effective as the existing policies for mitigating fetal harm. Third, plaintiffs' arguments must recognize that the costs and burdens of the proposed alternatives play a role in assessing the alternatives' relative effectiveness in addressing the employers' legitimate business goals.<sup>64</sup> *Wards Cove*, as applied to fetal protection in *Johnson Controls*, clearly complicates the plaintiff's task in a fetal protection case.

The *Johnson Controls* court further held that sterility or maleness may be bona fide occupational qualifications for jobs with sufficiently high and irremediable fetal risks. Defendant Johnson Controls, a manufacturer of batteries, convinced the court that lead in its workplace jeopardizes fetuses, that it had no technological alternative (short of eliminating production of batteries), and therefore that exclusion of all fertile women from its battery production is a BFOQ "proper and reasonably necessary to further the industrial safety concern of preventing the unborn child's exposure to lead."<sup>65</sup> The court drew upon first amendment law in reasoning that the absence of less restrictive alternatives to total exclusion supported a BFOQ determination.<sup>66</sup>

### c. EEOC Guidelines for Fetal Protection Policies

On Jan. 24, 1990, the U.S. Equal Employment Opportunity Com-

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Maternity Leave for Hospital X-Ray Technologist Violated Title VII, No. 202, at A-6 (Oct. 19, 1988).

62. 886 F.2d 871 (7th Cir. 1989).

63. *Id.* at 887; — U.S. —, 109 S.Ct. 2115, 2127, 104 L.Ed.2d 733 (1989).

64. 886 F.2d at 892.

65. *Id.* at 898-99.

66. *Id.* at 899-901 (discussing *Sable Communications v. FCC*, — U.S. —, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989)).

mission (EEOC) established guidelines for field staff to determine when an employer's fetal protection policy violates Title VII.<sup>67</sup> According to these guidelines, which follow on the heels of *Johnson Controls*, the only appropriate defense of a fetal protection case is the BFOQ defense. However, in deference to the approach taken by the courts in *Wright* and *Hayes*, the guidelines suggest that the BFOQ defense in fetal protection cases may be applied somewhat less stringently than in other contexts.<sup>68</sup>

In order to establish the BFOQ defense, the guidelines suggest that an employer must first prove that a "substantial risk of harm" exists through an employee's exposure to "reproductive or fetal hazards in the workplace."<sup>69</sup> Second, the fetal protection policy should be neutrally designed to protect the offspring of all employees, unless there is substantial evidence that the risk of harm applies only to one sex.<sup>70</sup> In order to justify exclusion of employees who are members of only one sex, the employer must prove need based on objective, scientific evidence supported by the opinions of qualified experts; an employer's subjective and good faith beliefs are insufficient proof that an exclusionary policy is necessary.<sup>71</sup> Finally, the employer must demonstrate that the policy "effectively eliminates the risk of fetal or reproductive harm."<sup>72</sup>

Even if an employer's fetal protection policy is able to withstand scrutiny under these tests, an exclusionary policy would not be upheld if reasonable and less discriminatory alternatives exist that will protect employees' offspring from reproductive or fetal harm.<sup>73</sup>

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67. *Bureau of Nat'l Affairs Daily Labor Report*, EEOC Policy Guidance on Seventh Circuit Decision in *United Auto Workers v. Johnson Controls Inc.*, No. 18, at D-1 (Jan. 26, 1990).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at D-3, n.14 (quoting *Wright v. Olin Corp.*, *supra* note 50).

72. *Id.*

73. *Id.* at D-1. In light of the EEOC Guidelines on fetal protection, which require objective, scientific evidence to support a defense of business necessity, employers should carefully study research regarding the effects of toxic substances and other workplace hazards. For example, one interesting project undertaken by several associations and unions studied the relationship between low level radiation from video display terminals (VDTs) and the risk of miscarriage among pregnant women. *Bureau of Nat'l Affairs Daily Labor Report*, SEIU and 9 to 5 to Help Administer Study on VDTs and Pregnancy Hazards, No. 111, at A-9 (June 10, 1985). Although studies continue to be conducted, researchers thus far have been unable to positively correlate VDT work with adverse reproduction consequences.

Another interesting study was released in 1986 by the University of Massachusetts School of Public Health on the high miscarriage rate among certain female production workers involved in the manufacture of computer chips who were exposed to various gases and solvents. The study compared their miscarriage rate to that of a control group of employees not involved in computer chip production. It revealed a self-reported miscarriage rate of 39 percent among workers exposed to various gases and acids through a "diffusion" process. The second group, exposed only to solvents, was found to have a miscarriage rate of 29 percent. In the general population, up to 20 percent of pregnancies end in miscarriage. Although the authors of the study acknowledge that it was "somewhat flawed methodologically," its results have raised concerns and questions within the industry.

## II UNEMPLOYMENT BENEFITS AND PREGNANCY

Unemployment compensation is a state legislative creation; thus eligibility depends upon applicable state statutes. Only a few states address pregnancy directly.<sup>74</sup> In most other states, whether a claimant is eligible for unemployment benefits when she leaves employment because of pregnancy depends upon whether she is considered to have left voluntarily without cause or without cause attributable to the employer.<sup>75</sup>

### A. States May and Do Compensate Employees Who Quit, Take Leave or Are Fired Because of Pregnancy

Perhaps the majority of states treat pregnancy-related terminations as involuntary and award unemployment benefits. For example, in *Pennsylvania Electric Co. v. Commonwealth Unemployment Compensation Board of Review*,<sup>76</sup> a pregnant woman's acceptance of a leave of absence, after having requested other work from the employer, did not constitute voluntary termination of employment so as to render the claimant ineligible for benefits. Some states, however, may treat pregnancy-related terminations as compensable, but deny benefits when the claimant neglected to request a leave of absence.<sup>77</sup>

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*Bureau of Nat'l Affairs Daily Labor Report*, Technology, Work Force Changes Create New Concerns on Reproductive Hazards, No. 122, at C-1 (June 26, 1987).

74. States with statutory provisions that specifically treat pregnancy as good cause for leaving work include Arkansas, South Dakota and Tennessee. See ARK. STAT. ANN. § 81-1106(a) (1976 & Supp. 1985); S.D. CODIFIED LAWS § 61-6-3 (1978); TENN. ANN. § 50-7-303(a)(1) (Supp. 1986).

75. See generally Termination of Employment Because of Pregnancy as Affecting Right to Unemployment Compensation, 51 A.L.R.3d 254 (1973).

76. 458 A.2d 626 (Pa. 1983). See also *Mountain States Tel. & Tel. Co. v. Industrial Com. of Colorado*, 637 P.2d 401 (Colo. 1981) (under statute providing full award of unemployment benefits when employee is physically unable to perform work, former employee was properly granted full benefits after termination from employment due to excessive absenteeism which was related to pregnancy and other conditions causing an inability to perform work); *Whitehead v. Mississippi Employment Security Comm'n*, 349 So.2d 1048 (Miss. 1977) (claimant whose company went into bankruptcy prior to termination of claimant's approved maternity leave was entitled to unemployment compensation); *Fisher v. State of Florida Dept. of Commerce*, 333 So.2d 513 (Fla. 1976) (claimant did not leave her employment without good cause where no work was available at the expiration of her maternity leave, so claimant was entitled to unemployment compensation); *Young v. Unemployment Insurance Appeal Board*, 37 Cal.App.3d 606, 112 Cal.Rptr. 460 (1974) (employee who was not scheduled for work after sixth month of pregnancy, consistent with employer's rule, was involuntarily terminated and entitled to unemployment compensation).

77. *Gillooly v. Commonwealth*, 462 A.2d 958 (Pa. 1983) (claimant who left work on very day her child was born with intention to remain away from work for at least six months was not entitled to benefits where claimant did not request leave of absence and where claimant otherwise failed to take reasonable steps to preserve her employment relationship); *Dohoney v. Director of Division of Employment Security*, 386 N.E.2d 10 (Mass. 1979) (claimant who failed to request leave of absence prior to leaving work for childbirth, and who declined part-time job offered by former employer subsequent to birth on asserted grounds that she preferred full-time position held prior to pregnancy, voluntarily terminated employment without good cause and was not entitled to unemployment compensation).

In light of the vast differences state to state and the rapid changes in interpretations, employees and employers must carefully research their respective states' rules in order to plan pregnancy-related leaves properly.

*B. Wimberly: Federal Law Does Not Require Preferential Treatment*

In an important case on unemployment benefits and pregnancy, the Supreme Court recently ruled in *Wimberly v. Labor and Industrial Relations Commission of Missouri*<sup>78</sup> that states are not required to pay unemployment benefits to women whose employers refused to reinstate them after absences for pregnancy or childbirth.

In *Wimberly* the claimant, a cashier at a J.C. Penney store in Kansas City, Mo., took a three-month leave to have a baby without guarantee of reinstatement. One month after the baby was born, she notified her employer of her desire to return to work and was told that there were no positions open.

The state rejected Wimberly's unemployment claim because state law excludes from benefits a worker who left his or her job "voluntarily without good cause attributable to his work or to his employer." The denial was upheld on appeal. Wimberly then sued under Section 3304(a)(12) of the Federal Unemployment Tax Act, which states that unemployment compensation shall not be denied "solely on the basis of pregnancy or termination of pregnancy."<sup>79</sup>

The Supreme Court, in a unanimous opinion written by Justice O'Connor, held the Missouri statute is consistent with the federal statute as it denies unemployment benefits to all persons "who leave their jobs for a reason not causally connected to their work or their employer" and does not discriminate on the basis of pregnancy.<sup>80</sup> Justice O'Connor reasoned that the federal statute prohibits unfavorable treatment on the basis of pregnancy but does not mandate "preferential treatment."<sup>81</sup> In the Court's opinion, the relevant inquiry is whether the claimant stopped work for a reason having a causal connection to her work or her employer and whether the Missouri statute is a neutral rule that "incidentally disqualifies pregnant or formerly pregnant claimants as a part of a larger group," and not solely on the basis of pregnancy.<sup>82</sup>

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78. 479 U.S. 511 (1987).

79. 26 U.S.C. § 3304(a)(12)(1989).

80. 479 U.S. at 512.

81. *Id. Accord* Sokol v. Smith, 671 F. Supp. 1243 (W.D. Mo. 1987).

82. *Id.* at 517; compare an earlier decision, *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983) (South Carolina's practice of denying unemployment compensation to claimants who voluntarily quit their jobs due to pregnancy struck down as conflicting with 26 U.S.C. § 3304(a)(12)); *see also* *Buchanan v. Director of the Div. of Employment Security*, 471 N.E.2d 345 (Mass. 1984) (state's base-earnings requirement upheld even though it may effectively deny benefits to pregnant women who took maternity leave).

C. *States May Not Deny Unemployment Compensation Solely on the Basis of Pregnancy*

While *Wimberly* clarifies that federal law requires no preferential treatment, it and other cases emphasize the prohibition against singling out pregnancy. In *Turner v. Department of Employment Security*,<sup>83</sup> the Supreme Court struck down a Utah statute under which pregnant women were ineligible for employment benefits for a period from twelve weeks before the expected date of birth until six weeks after delivery. The Court held that the presumption created by the statute, that women are unable to work during that period because of pregnancy or childbirth, and are thus ineligible for benefits, violated the due process clause of the fourteenth amendment since it could not be doubted that substantial numbers of women worked during that time. The Court held that Utah was under an obligation to determine ability case by case.

### III

#### STATE LAWS ON PREGNANCY-RELATED LEAVES

About half of the states (and the District of Columbia) have enacted some type of legislation dealing with pregnancy or maternity leaves. These statutes vary widely and should be reviewed carefully for each state in which an employer operates.

A. *Some States Simply Classify Pregnancy as a Disability*

Some fifteen states and the District of Columbia have enacted legislation that classifies pregnancy as a disability. Similar to the PDA, these state laws and regulations require that pregnant employees should be treated the same as other employees with temporary disabilities and, accordingly, that maternity leaves be treated as sick leave. The typical definition reads as follows:

Disabilities caused or contributed to by pregnancy . . . are for all job related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance, or sick leave available in connection with employment.<sup>84</sup>

Thus, no leave is mandated unless provided for other disabilities.

B. *Some States Require Pregnancy-Related Leave*

Some nine states<sup>85</sup> have enacted statutes that require employers to make pregnancy leave available for a reasonable period of time, typically

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83. 423 U.S. 44 (1975).

84. Colo. Civil Rights Comm'n Sex Discrimination Rule 80.8. Pregnancy is also classified as a disability in the District of Columbia, Illinois, Iowa, Kansas, Kentucky, Missouri, Maine, New Hampshire, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island and South Dakota.

85. See *infra* note 90.

three or four months. These statutes vary considerably, however. Some limit maternity leave to female employees for a period of disability while others include a period of parental leave for child-care.

Courts generally will interpret the term "maternity leave" strictly and exclude leave to care for a child. For example, in *Martin v. Dann*,<sup>86</sup> a Colorado court held that a federal agency's refusal of a male employee's application for six days of sick leave to be used for his participation in the birth of his child was not discrimination based on sex. The court noted that under the agency's rules, an employee could request sick leave only when he or she had a medically-certified disability or incapacitation. The court indicated that a husband is not personally incapacitated by his wife's pregnancy, nor may he claim entitlement to sick leave by reason of her incapacitation.

Also, in *Chaleff v. Board of Trustees, Teachers Pension and Annuity Fund*,<sup>87</sup> a New Jersey court held that a female employee may take maternity leave only for the period she is physically disabled and that a father on leave is not entitled to pension credits for the period of child-care leave. Similarly, a Pennsylvania court has held that Pennsylvania fair employment laws do not require an employer to extend pregnancy leave to a non-disabled mother for breast-feeding.<sup>88</sup> The court found that the employer's further refusal to grant discretionary leave to the mother to breast-feed the allergy-prone child was not discriminatory since a male teacher seeking child-care leave also would have been denied leave.

### 1. *The California Statute*

Under California's statute, which was upheld in *California Federal Savings & Loan Association v. Guerra*,<sup>89</sup> an employer must provide leave for the period of disability of a female employee disabled by pregnancy, childbirth or a related medical condition, not to exceed four months, even if its temporary disability policy otherwise provides less leave time.<sup>90</sup> Leave may be unpaid, except that an employee is entitled to use any accrued vacation time during the period of such leave. An employee is required to give "reasonable notice" of the commencement and estimated duration of such leave.

According to the Department of Fair Employment and Housing, which administers the statute, an employee is entitled to take leave either before or after childbirth depending on when she is disabled from performing the essential functions of her job. A doctor's certification may

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86. 9 Empl. Prac. Dec. (CCH) ¶ 10128 (D.C. Cir. 1975).

87. 457 A.2d 33 (1983).

88. Board of School Directors of Fox Chapel Area School Dist. v. Rossetti, 411 A.2d 486 (Pa. 1979).

89. 479 U.S. 272 (1987).

90. Cal. Gov't Code § 12945(b)(2) (West Supp. 1987).

be required to verify disability because of pregnancy, provided such certification is required to verify other temporary disabilities.

An employee on leave for up to four months must be returned to the same or similar work upon expiration of the leave or within a reasonable time thereafter. The employee is entitled to reinstatement to her former job unless the position has become unavailable because of business necessity. Even in this event she is entitled to be given a substantially similar job unless no such job is available despite the employer's reasonable good faith effort.

Although terms like "business necessity" as used in Section 12945(b)(2) have yet to be clarified in court decisions, it seems certain that an employer that fails to reinstate a female employee upon her return from pregnancy disability leave will need compelling reasons to justify the decision. If, for example, the employee would have been adversely affected by a lay off or reorganization that took place during her absence, she will probably be treated the same as she would have been had she remained at work. Otherwise an employer will probably have to demonstrate that because of business necessity the employee's absence could not have been covered by a temporary employee, a temporary reorganization, or simply by deferring work.

*a. California's Statute Upheld: California Federal Savings and Loan Association v. Guerra*

In January 1987, the Supreme Court in *California Federal Savings & Loan Association v. Guerra*,<sup>91</sup> upheld the California pregnancy statute against an employer challenge that the law was invalid under Title VII. Writing for the majority, Justice Marshall reasoned that the ultimate purpose of the PDA is to abolish discrimination against female employees based on pregnancy. The PDA does not forbid preferential treatment of pregnant employees where the purpose is to further equal employment opportunities. Thus, Justice Marshall concluded, the preferential treatment that pregnant employees receive under the California law is not unlawful under Title VII.

Justice Marshall framed the legal issue by examining whether there was an actual conflict between federal and state law. On one hand, Title VII's purpose is "to achieve a quality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."<sup>92</sup> On the other, compliance with both federal and state law is not a physical impossibility under Section 12945(b)(2) because it does not compel employers to treat pregnant employees better than other disabled employees; it merely estab-

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91. 479 U.S. 272 (1987).

92. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

lishes benefits that an employer, at minimum, must provide to pregnant workers. The California statute does not bar granting comparable benefits to other disabled employees. Thus, Title VII did not preempt the California law because the California statute neither conflicted with the purposes of Title VII nor required employment policies that are unlawful under Title VII.

The Supreme Court emphasized the limited nature of the benefits provided by Section 12945(b)(2). Justice Marshall underscored the fact that Section 12945(b)(2) is narrowly drawn to cover only the period of "actual physical disability on account of pregnancy, childbirth or related medical conditions" and does not "reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers."<sup>93</sup> Thus the Court was sensitive to the possibility that discrimination against pregnant workers could appear in the form of overly protective measures for pregnant employees.<sup>94</sup>

*b. Title VII Problems*

Under the California statute, employers are not required to verify actual disability. Thus, some employers may allow female employees to use part of this mandated leave as a parenting/child-rearing leave rather than a pregnancy/disability leave. While there are many reasons to grant parental leave (*see infra* Section IV.B.6), an employer should not confuse pregnancy disability statutes, such as California's, with child-rearing leaves.

Although no published court cases have addressed the issue to date, most courts probably would hold that any form of parenting leave (which would include that part of the post-childbirth period not resulting in actual disability) would have to apply equally to men and women to meet Title VII standards. The issue whether Title VII should invalidate parental/child-rearing leaves for women only is not without controversy. Some argue that under *Guerra* the PDA does not forbid preferential treatment for pregnant employees where the purpose is to further equal employment opportunities. While protecting women's jobs during their unique disability period will further this goal, they argue, providing child-rearing/parental leave exclusively to women only reinforces stereotypes and discourages equal employment opportunities, since both men and women can care for children. Others contend that without special child-rearing protection women will be disadvantaged in the workplace since statistically child rearing remains a predominantly female role.

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93. *Guerra*, 479 U.S. at 290.

94. Many parties submitted *amicus curiae* briefs. For a discussion of those briefs, *see generally* Stewart, *Equal Employment for Pregnant Workers*, 73 A.B.A. J. 40 (March 15, 1987).



## 2. *Massachusetts' Statute Specifically Includes Adoption*

Like California, Massachusetts has a statute that requires an employer to provide pregnancy disability leave. It provides for maternity leave for up to eight weeks and includes leave for adoption of a child under three years of age.<sup>95</sup> By mixing leave to care for a newly adopted child, which involves no medical disability, with maternity/pregnancy leave and making both available to female employees only, the Massachusetts statute appears to raise Title VII questions.

## 3. *Montana's Statute Upheld: Miller-Wohl Co.*

The Montana Maternity Leave Act provides that an employer may not terminate a woman's employment because of pregnancy, refuse to grant the employee a "reasonable leave of absence" for the pregnancy, or deny an employee who is disabled as the result of a pregnancy any compensation to which she is entitled as a result of disability or leave benefits accumulated during her employment.<sup>96</sup> In addition, the Montana act provides job protection by requiring employers to reinstate employees upon return from pregnancy leave to their "original job or an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other service credits unless, in the case of a private employer, the employer's circumstances" changed as to make it unreasonable to do so.<sup>97</sup>

In *Miller-Wohl Co. v. Commissioner of Labor and Industry*,<sup>98</sup> the Montana Supreme Court upheld the Montana Maternity Leave Act against a challenge that it was preempted by the PDA. The employer had a policy of requiring one year of employment for any employee eligible for excessive sick days or an extended leave of absence. Since the plaintiff had not worked the requisite year, she was discharged for excessive absences due to pregnancy-related illness. The Montana Supreme Court found Miller-Wohl's facially neutral policy of not granting leaves of absence to any temporarily disabled employee until the end of one year of employment created a disparate effect on women.

One week after the Supreme Court ruled in *Guerra*, it remanded *Miller-Wohl* to the Montana Supreme Court and ordered review in light of *Guerra*.<sup>99</sup> The state court affirmed its earlier decision upon

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95. MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1972). The other states that provide some type of leave are California, Connecticut, Hawaii, Maryland, Minnesota, Montana, Washington and Wyoming.

96. MONT. CODE ANN. §§ 49-2-310 - 311 (1985).

97. *Id.*

98. 214 Mont. 238, 692 P.2d 1243 (1984).

99. *Miller-Wohl Co. v. Commissioner of Labor and Industry*, 479 U.S. 1050 (1987), *vacating*, 214 Mont. 238, 692 P.2d 1243 (1984). The Supreme Court also has considered whether New York's pregnancy benefit laws were preempted by ERISA, 29 U.S.C. § 1001. *See Shaw v. Delta Airlines*,

reconsideration.<sup>100</sup>

#### IV

### PROPOSED LEGISLATION ON PARENTAL LEAVE

#### A. *Title VII Does Not Cover Parental Leave*

Title VII, as noted, only mandates that a pregnancy disability be treated the same as any other disability. It does not require that employers offer disability leave of any kind. Indeed, a woman who can no longer work because of her pregnancy may be terminated under Title VII, so long as a man equally disabled would have been fired under the same or similar circumstances.

Similarly, Title VII also does not mandate any type of child-rearing leave. Insofar as Title VII reaches this matter, it is only to require that employers who offer child-rearing leaves do so in an even-handed manner.<sup>101</sup>

Thus, the protections of Title VII are limited. As a result, Congress and state legislatures continue to propose new, broader legislation to cover parenting leaves.

#### B. *Proposed Federal Legislation*

In 1983, the Social Security Administration estimated that only sixty-four percent of the wage earners in this country are covered by formal short-term disability plans, and many of these plans offer no job protection.<sup>102</sup> Federal law presently does not require employers to provide any employee disability leave. Accordingly, both pregnant women and others suffering from short-term disabilities have no federally mandated job protection. Additionally, employees with pressing family obligations due to the birth, adoption or serious illness of a child are often faced with the problems of balancing family obligations with employment responsibilities.

In response to this concern, both houses of Congress recently considered comprehensive bills providing for job-protected parental leave and short term disability leave. The Parental and Medical Leave Act of 1987 (S. 249) prompted a national debate during Senate committee hearings.<sup>103</sup> Its successor, the Parental and Medical Leave Act of 1988 (S.

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463 U.S. 85 (1983). In *Shaw*, the Court concluded that ERISA preempts only state provisions that prohibit practices permissible under Title VII.

100. *Miller-Wohl Co. v. Commissioner of Labor and Industry*, 228 Mont. 505, 744 P.2d 871 (1987).

101. 2 EEOC Compliance Manual (BNA) § 626.2 (Dec. 18, 1980).

102. Staffs of Rep. William Clay, Rep. Patricia Schroeder, and Sen. Christopher Dodd, 100th Cong., 1st Sess., *Briefing Paper on the Family and Medical Leave Act*, 4 (1987) [hereinafter *Staffs*].

103. S. 249, 100th Cong., 1st Sess. (1987).

2488),<sup>104</sup> enjoyed bipartisan support as a compromise bill that closely paralleled a House bill, the Family and Medical Leave Act of 1987 (H.R. 925).<sup>105</sup> Although H.R. 925 and S. 2488 enjoyed strong congressional support, both bills failed to pass during the 100th Congress. The bills have been reintroduced in substantially the same form in the 101st Congress as H.R. 770 and S. 345, respectively. Given the strong support for these bills, a review of their provisions provides useful ideas and provokes thought.

### *1. The Purpose of S. 2488*

The Parental and Medical Leave Act of 1988 was premised upon the following findings:

- (1) the number of two-parent households in which both parents work and the number of single-parent households in which the single parent works are increasing significantly;
- (2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early child-rearing and the care of children who have serious health conditions;
- (3) the lack of employment policies to accommodate working parents forces many individuals to choose between job security and parenting;
- (4) there is inadequate job security for employees who have serious health conditions that prevent the employees from working for temporary periods;
- (5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects their working lives more than it affects the working lives of men; and
- (6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.<sup>106</sup>

Based on these findings, S. 2488 was designed for the following purposes:

- (1) to balance the demands of the workplace with the needs of the family;
- (2) to promote the economic security and stability of families;
- (3) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child who has a serious health condition;
- (4) to accomplish such purposes in a manner which accommodates the legitimate interests of employers;
- (5) to accomplish such purposes in a manner which, consistent with the equal protection clause of the fourteenth amendment, minimizes the po-

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104. S. 2248, 100th Cong., 2d Sess. (1988).

105. H.R. 925, 100th Cong., 1st Sess. (1987).

106. Senate Comm. on Labor and Human Resources, Parental and Medical Leave Act of 1988, S. REP. NO. 447, 100th Cong., 2d Sess. § 101(a) at 2 (1988) (hereinafter S. 2488 Report).

tential for employment discrimination on the basis of sex for ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(6) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.<sup>107</sup>

## 2. *General Provisions of S. 2488*

Title I of S. 2488 provided parental leave and temporary medical leave for employees of private sector employers. Title II of this bill provided similar leaves for civil service employees of federal, state and local governments. Under amended S. 2488, however, an exemption for small employers was provided: the bill applied only to employers with fifty or more employees at any one worksite for at least twenty weeks during a calendar year. This small-employer exemption would have covered approximately 95 percent of all private sector employers.<sup>108</sup> However, the small-employer exemption involved only an estimated 40 percent to 42 percent of the workforce and it was estimated that almost half of the employees in the U.S. would be covered by the amended S. 2488.<sup>109</sup>

To have been eligible for coverage under S. 2488, an employee was required to have worked for at least one year and for at least 900 hours during the previous twelve-month period.<sup>110</sup> Once qualified, an employee was permitted to take up to ten weeks of unpaid parental leave for the care of a newborn child, newly placed adopted or foster care child, or seriously ill child during any twenty-four months.<sup>111</sup> That entitlement would expire at the end of a twelve-month period commencing with the birth or placement of the child.<sup>112</sup> In the case of a child's serious health condition, leave was allowed to be taken intermittently if medically necessary.<sup>113</sup>

S. 2488 also allowed for an employer and employee to agree that parental leave be taken on a reduced leave schedule, which was statutorily defined as a "leave scheduled for fewer than the usual number of hours of an employee per workweek or hours per workday."<sup>114</sup> An em-

107. *Id.* § 101(b) at 3.

108. 134 CONG. REC. S13323, 13377 (daily ed. Sept. 27, 1988). ("The effect of [the amendment] is that 95 percent of all business, all business in the United States, would be exempt under the parental leave legislation if this amendment is adopted." Statement of Sen. Dodd who submitted Senate-approved Amendment No. 3291 to S. 2488 Report. The amendment raised the exemption level for employers so that employers with fewer than fifty employees, instead of fewer than twenty employees, would not be subject to the bill.)

109. 134 CONG. REC. S13254 (daily ed. Sept. 26, 1988); S. 2488 Report, *supra* note 100, at 21.

110. S. 2488 Report, *supra* note 100, § 102(3) at 3.

111. *Id.*, § 103(a)(1) at 5.

112. *Id.*, § 103(a)(2).

113. *Id.*, § 103(a)(3).

114. *Id.*, § 102(8) at 4.

ployer who provided for paid parental leave covering less than ten weeks was allowed to supplement the paid leave with additional weeks of unpaid leave in order to attain the ten-week leave period.<sup>115</sup> An employee or employer was able to substitute any accrued paid vacation leave, personal leave, sick leave or paid medical leave for any part of the ten-week leave period provided by the Act.<sup>116</sup> If parental leave was necessary and foreseeable for the birth, adoption or planned medical treatment of a child, an employee was required to provide reasonable prior notice to the employer and make a reasonable effort to schedule the leave so as to not unduly disrupt the employer's operations.<sup>117</sup> If a husband and wife were employed by the same employer, the total number of weeks of parental leave to which both were entitled was limited to 10 weeks during any 24-month period.<sup>118</sup>

An employee who was unable to perform the functions of his or her job because of a serious health condition was entitled to temporary medical leave not to exceed ten weeks during any twelve-month period.<sup>119</sup> (Proposals in the 101st Congress have increased this entitlement to fifteen weeks.<sup>120</sup>) Unpaid temporary medical leave was also subject to substitution of paid leave, reasonable prior notice to the employer, scheduling efforts to minimize disruption of the employer's operations, and certification of the serious health condition.<sup>121</sup>

S. 2488 further (1) provided that all leaves were available to both men and women equally; (2) provided for the continuation of health benefits during and after the leave; (3) protected the preexisting seniority rights and preexisting employee benefits after termination of the leave; and (4) guaranteed reinstatement in the same or an equivalent position upon termination of the leave.

### 3. Enforcement Provisions Under S. 2488

The enforcement provisions of S. 2488 provided for administrative investigation and hearings by the Secretary of Labor with alternative judicial enforcement.<sup>122</sup> Additionally, the administrative proceedings provisions contained strict deadlines to facilitate the prompt processing of claims. The provision for alternative judicial enforcement would have allowed employees to avoid or abandon the agency procedures. S. 2488

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115. *Id.*, § 103(d)(1) at 5.

116. *Id.*, § 103(d)(2).

117. *Id.*, § 103(e)(2)(A).

118. *Id.*, § 103(f) at 6.

119. *Id.*, § 104(a)(2); 134 CONG. REC. S13377 (daily ed. Sept. 27, 1988).

120. See H.R. 770, 101st Cong., 1st Sess.; S. 345, 101st Cong., 1st Sess.

121. S 2488 Report, *supra* note 100, § 104-105 at 6.

122. *Id.*, § 108-109 at 9.

also authorized strict penalties for noncompliance, which included reinstatement, back pay and benefits, general damages, and attorneys' fees.

#### 4. *Establishment of Commission on Parental and Medical Leave*

A fairly controversial portion of the bill provided for the establishment of a commission to study the possibility of paid family and medical leave. The commission was authorized to conduct a comprehensive study of "existing and proposed methods designed to provide workers with full or partial salary replacement or other income protection during periods of parental leave and temporary medical leave."<sup>123</sup>

#### 5. *The House Bill: H.R. 925*

House Bill 925 originally looked quite similar to the earlier Senate version, S. 249. However, a compromise bill was approved by the House Education and Labor Committee on Nov. 17, 1987. This bill was, in turn, closely mirrored by amended Senate Bill, S. 2488. The last version of the House bill applied to employers of fifty or more persons for the first three years of its enactment, and thereafter would have applied to employers of thirty-five or more persons. It allowed employees up to ten weeks of leave in a two-year period upon the birth or adoption of a child or the serious illness of a child or parent. The bill also provided up to fifteen weeks of leave per year in the event of an employee's own illness. To be eligible for coverage under H.R. 925, an employee would have been required to have worked twenty or more hours a week for at least one year. An employee's health insurance was continued during the leave, and he or she was guaranteed the same or equivalent job upon returning to work. H.R. 925 was favorably reported by the House Committee on Education and Labor in 1987 and by the Committee on Post Office and Civil Service in February 1988.<sup>124</sup> However, no further action was taken and the House failed to approve H.R. 925 before the 100th Congress adjourned.

#### 6. *Support and Opposition*

Debate over the federal legislation involves a philosophical distinction: whether the bills provide an employee benefit or a minimum labor standard.

Proponents of the Parental and Medical Leave Act cite the changing demographics of the American workforce as the primary impetus behind this legislation. They argue that although more and more women continue to enter the workforce, America's social policies have not been adequately changed to accommodate them; while many employers have

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123. *Id.*, § 301 at 18.

124. *Id.*, at 33.

addressed the problems faced by the two income family, many have not and many of those who have addressed these problems have not done so adequately. Supporters of this legislation feel that Congress must take the initiative, respond as it has in the labor arena in the past, and enact social legislation to deal with these problems.<sup>125</sup>

Opponents of the bill feel it is intrusive legislation that interferes with the free market. They feel that not only should Congress be precluded from mandating benefits — as an action which is to the detriment of both employers and employees — but that the present system of competitiveness will create the proper institutions at a lower cost to both employers and employees. Opponents argue that the cost of implementing this bill will require a reduction in other employee benefits, will place severe economic hardship on small businesses, and will actually result in additional discrimination against women of childbearing age.<sup>126</sup>

#### a. *The Changing Workforce*

Neither supporters nor opponents of the legislation deny that the American workforce has changed dramatically in recent years. In 1950, only 12 percent of women with children under six were in the paid workforce, while in 1986 that figure had reached 54 percent.<sup>127</sup> Sixty percent of women with children aged three to five work, 50 percent of all mothers with children under three work, and 48 percent of all mothers with infants under one work.<sup>128</sup> Both parents work in more than half of all two-parent families<sup>129</sup> and single-parent families make up 16 percent of all families.<sup>130</sup> Moreover, women make up 44 percent of the American workforce.<sup>131</sup> Of those women, 85 percent are likely to become pregnant at some point in their careers.<sup>132</sup> While most scholars agree these statistics indicate the need for some type of benefit plan aimed at working parents, the debate centers around whether that task should be done by Congress or by the voluntary joint efforts of employees and employers.

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125. Wall St. J., Nov. 18, 1987, at 12, col. 2.

126. *Parental and Temporary Medical Leave, 1987: Hearings on S.249 Before the Subcommittee on Children, Families, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. (Feb. 19, 1987) (statement of Frances Shaine on behalf of the U.S. Chamber of Commerce) [hereinafter *Senate Labor*].

127. *Id.*, (statement of James T. Bond, Director, NCJW Center on the Child).

128. Staffs, *supra* note 96, at 12.

129. *Senate Labor*, *supra* note 119 (June 15, 1987) (statement of T.B. Brazelton, M.D., Chief, Boston Children's Hosp. Child Dev. Unit).

130. *Id.*, (April 23, 1987) (statement of Rosemary Trump, International Vice President of Service Employees International Union).

131. *Id.*

132. *Id.*, (June 15, 1987) (statement of Chairman Christopher J. Dodd).

*b. Current Employer Policies*

Many of the statements given at the hearings addressed the maternity leave and parental leave policies that are currently provided by employers. The ensuing argument relies upon a varying premise depending on the point to be made. Proponents of the legislation support their claim that this is much needed legislation by citing a study by the NCJW Center for the Child which indicates that only 1 percent of female workers currently receive the package which would be provided by the Parental and Medical Leave Act.<sup>133</sup> Opponents of the legislation use this figure to support their claim that the costs of this legislation will cripple small businesses. The same study also indicates that many firms already offer varying amounts of maternity leave and parental leave.<sup>134</sup>

A survey done by the National Chamber of Commerce Foundation revealed that 77 percent of the 700 firms surveyed have some type of parental leave policies, and that an additional 17 percent responded that their employees preferred other benefits over parental leave.<sup>135</sup> These surveys are used by both supporters and opponents of the bill. Those who support the legislation argue that this is a basis for their claim that the costs of the legislation to employers will be minimal. Those who oppose the legislation use the surveys as support for their argument that the legislation is unnecessary.

There can be no question that the Parental and Medical Leave Act would greatly alter American policies on paternity leave. Although many firms do offer extended maternity leaves, paternity leaves are generally limited to a few days. The Catalyst Career and Family Center's nationwide survey of maternity and paternity leaves found that 62.8 percent of the 384 Fortune 500 companies surveyed did not consider it appropriate for men to take any kind of parental leave.<sup>136</sup> Likewise, in a survey of federal agencies, the House Subcommittee on Civil Services found that under federal parental leave policies, which leave much up to the discretion of the individual supervisors, men were denied parental leave more often than women.<sup>137</sup>

Although paternity leave is seldom taken in this country, in Sweden, where paternity leave has been available since 1974, the percentage of men using it has risen from 3 percent to 22 percent in seven years.<sup>138</sup>

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133. *Id.*, (Feb. 19, 1987) (statement of James T. Bond, Director, NCJW Center on the Child).

134. *Id.*

135. *Id.* (statement of Frances Shaine on behalf of the U.S. Chamber of Commerce).

136. Staffs, *supra* note 96, at 14.

137. *Family and Medical Leave Act of 1987: Joint Hearings on H.R. 925 Before the Subcomm. on Civil Services and the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. 32 (1987) [hereinafter *House Post Office*].

138. *Id.* at 46 (Citing BUREAU OF NATIONAL AFFAIRS, WORK AND FAMILY: A CHANGING DYNAMIC 174 (1986)).



c. *The Debated Discriminatory Effect of the Proposed Legislation*

Much of the debate surrounding this legislation centers on the question of whether, as intended, this legislation will help women to attain equality in the workforce or whether, in sharp contradistinction, it will result in additional discrimination against women. Most agree that forcing women to leave the workforce when they take time off to have children aggravates existing inequalities in male and female pay and additionally worsens the problems of female unemployment and resulting poverty.<sup>139</sup>

Many argue, however, that given current societal viewpoints on who should be primarily responsible for children, employers will tend to view women as the beneficiaries of a parental leave policy. This view could result in discriminatory hiring practices. As stated by Frances Shaine for the U.S. Chamber of Commerce:

Equality of treatment for working women is preferable to mandating special treatment for women with family responsibilities — the latter being what California law and most other nations most often provide. Although technically this legislation applies to men *and* women, we all realize that women have tended to assume the vast majority of family responsibilities. This stereotype is likely to have an adverse impact on working women if this legislation becomes law.<sup>140</sup>

Many, but by no means all, women's organizations have endorsed this legislation.<sup>141</sup> They feel that because family leave and medical leave will be equally available to both men and women, the bill will not result in discrimination. Eleanor Holmes Norton, speaking on behalf of many women's and civil rights groups and unions, including the National Organization for Women and the Women's Legal Defense Fund, stated:

Faced with the knowledge that job-protected leaves were required for working mothers and working mothers only, employers would very likely be reluctant to hire or promote women of child bearing age. Under the proposed legislation, however, because employers would be required to provide job-protected leaves for all employees in circumstances that affect them all approximately equally, they would have no incentive to discriminate against women.<sup>142</sup>

Likewise, when supporters of the legislation point out that every

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139. *Senate Labor*, *supra* note 119 (Feb. 19, 1987) (statement of Karen Nussbaum, Exec. Dir., Nine to Five: National Ass'n of Working Women; President of District 925, Service Employees International Union).

140. *Id.*; but see Krieger and Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513 (1983) (contending that with regard to certain inherent differences between men and women, such as the ability to become pregnant, positive action geared at changing the institutions in which women work to accommodate women as well as men is necessary to the achievement of women's equality).

141. *Staffs*, *supra* note 96, at 19-21.

142. *House Post Office*, *supra* note 130, at 39.

major industrialized nation in the world, with the exception of the United States, has a national maternity or parental leave policy,<sup>143</sup> opponents of the legislation have pointed out that in those European countries that have the most generous maternity leaves unemployment rates for women of child bearing age are high and women have remained largely in menial, low-skilled jobs.<sup>144</sup>

*d. The Debated Cost of the Proposed Legislation*

The other major focus of the debate is on whether this legislation will be costly, and if so, whether it will bankrupt American businesses. Again, both sides of the debate use the same arguments to make different points. The high costs of recruiting and training a new employee in terms of both out-of-pocket expenses and lost productivity are cited by proponents of the bill to illustrate the value to businesses of retaining, rather than permanently replacing, skilled employees who take disability or family leave. The same figures are cited by opponents of the bill to illustrate the expense of temporarily replacing an employee on leave.<sup>145</sup>

The U.S. Chamber of Commerce estimated the cost of the Senate's earlier proposal, S. 249, to employers at 2.6 billion dollars.<sup>146</sup> According to the General Accounting Office (GAO), the cost of the earlier Senate Bill would have been at most \$500 million a year. More recently, the GAO estimated the cost to employers of the 1988 Senate's revised proposal, S. 2488, at \$197 million a year,<sup>147</sup> and with the amendment to S. 2488 which raised the exemption level for employers, the estimated cost of S. 2488 to employers was \$160 million.<sup>148</sup> Most of this amount would be from the cost of continuing health insurance for employees on unpaid leave; the GAO found the net cost of adjusting to the absence of a worker on temporary leave to be "little if any."<sup>149</sup>

The GAO had previously pointed out numerous flaws in the Chamber of Commerce's analysis, including failure to consider the loss of productivity associated with the permanent loss of a trained employee and the costs of recruiting and training a new permanent employee.<sup>150</sup> The GAO also pointed out that most companies rearrange schedules and as-

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143. *Senate Labor*, *supra* note 119 (April 23, 1987) (statement of Chairman Christopher J. Dodd).

144. *Id.*, (Feb. 19, 1987) (statement of Frances Shaine on behalf of the U.S. Chamber of Commerce).

145. *Id.*, (April 23, 1987) (statement of Cynthia Durham Simpler on behalf of the American Society for Personnel Management) at 390.

146. *Id.*, (April 23, 1987) (statement of Chairman Dodd) at 284.

147. S. 2488 Report, *supra* note 100, at 32, 52.

148. 134 CONG. REC. S13323 (daily ed. Sept. 27, 1988).

149. *Senate Labor*, *supra* note 119, at 469 (Oct. 29, 1987) (Statement of William J. Gainor, Associate Director of Human Resources Division, General Accounting Office).

150. *Id.*, (April 23, 1987) (statement of William J. Gainor) 314-22.

signments rather than hiring a temporary employee when employees are on leave, that many firms hire temporaries directly rather than going through a temporary agency, that the failure to give job-protection can result in lower morale, lower productivity and increased absenteeism among employees, and that an employee who remains at work with a new child or a sick family member at home is not fully productive either.<sup>151</sup> The GAO further asserted that the Chamber of Commerce failed to consider the states that already provide disability insurance, and that the Chamber greatly overestimated the number of employees who would use the leave and the length of leave that would be taken by each employee.<sup>152</sup>

Because it is unlikely that single or low-income parents will be able to afford more than a very minimal unpaid leave, opponents of the legislation characterize it as a “yuppie” proposal, which will only benefit two-income upwardly mobile couples. Proponents respond that because professionals are more costly to replace, they tend to already have job-protected leaves. Moreover, a recent poll to determine the support for unpaid parental leaves found that where 67 percent of those earning less than \$30,000 yearly and 72 percent of those earning \$20,000 to \$30,000 yearly supported a federal policy of unpaid parental leaves, only 48 percent of those earning more than \$40,000 yearly supported such a policy.<sup>153</sup>

### C. State Legislation: The California Example

#### 1. Child-Rearing Leave Bill Vetoed: AB 368

The California legislature passed a “Parent’s Rights Act” in 1987. Premised on findings much like those of the federal legislation, the bill would have allowed both male and female employees to take up to four months of job-protected child rearing leave in any twenty-four month period.<sup>154</sup> The bill would have applied to employers with twenty-five or more full-time employees, and would have included leave for the birth, adoption, or serious illness of an employee’s child.

Governor Deukmejian vetoed the bill on Sept. 30, 1987, stating: Current law already requires employers to grant pregnancy or childbirth leave for a reasonable period of time, up to four months. Unlike AB 368 [the vetoed bill], the current statute applies to all employers. There has been no demonstration that current law fails to adequately provide for a family’s needs in this area.<sup>155</sup>

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151. *Id.*

152. *Id.*

153. *Id.*, (April 23, 1987) (statement of Gerald McEntree, International President of American Federation of State, County and Municipal Employees).

154. The Parents’ Rights Act of 1987, AB 368 (Moore) (1987-88 Sess.) at 4, 5.

155. UPI wire, October 1, 1987 (available on LEXIS NEXIS).

The governor's statement illustrates that he too fails to recognize the distinction between a "pregnancy or childbirth leave" and parental leave available to both parents for the care of the child. The current statute does not contain any provision for "a family's needs." Its purpose is to cover a woman's actual, medical disability because of pregnancy, and nothing more.

## 2. *Pending Child-Rearing and Family-Care Leave Bills*

Following the Governor's veto of AB 368 in 1987, a number of child-rearing and family-care leave bills have been introduced in the California Assembly and Senate. AB 2738, introduced in January 1988, was identical to the earlier bill passed by the California legislature, except a provision was added to prohibit an employee from using sick leave during the parental leave period except upon the mutual consent of the employer and employee.<sup>156</sup> AB 2738 allowed up to four months of job-protected child rearing leave in any twenty-four month period to male and female parents and applied to any employer who employed twenty-five or more employees.<sup>157</sup>

More recently, AB 2738 has been substituted by its author with a more expansive bill, AB 77, The Family Rights Act of 1989.<sup>158</sup> Under AB 77, employees are allowed unpaid "family care" leave for a period of up to four months for the birth, adoption or illness of a child and for the care of a parent with a serious health condition.<sup>159</sup> A "serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition" involving inpatient care in a hospital, hospice or residential health care facility or continuing treatment or supervision by a health care provider.<sup>160</sup> Similar to the earlier leave bills, an employer is not required to grant an employee family leave if the refusal is necessary to prevent undue hardship to the employer's operations.<sup>161</sup>

In January 1989, a child-rearing leave bill was also introduced in the California Senate, SB 257. This bill permits employees to take up to eighteen weeks of unpaid leave for the birth or adoption of a child or for the care of a child with a serious health condition and would apply to employers with fifteen or more employees.<sup>162</sup> Unlike the Assembly's child-rearing leave bills, which allow employees to participate in health and welfare benefit plans at their own expense, the Senate bill requires employers to maintain health insurance for the employees who take an

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156. Parents' Rights Act of 1988, AB 2738 (Moore) (1987-88 Sess.).

157. *Id.*

158. The Family Rights Act of 1989, AB 77 (Moore) (1989-90 Sess.).

159. *Id.*

160. *Id.*

161. *Id.*

162. SB 257, § 1 (Torres) (1989-90 Sess.).

unpaid leave of absence.<sup>163</sup>

SB 257 was a revision of an earlier child-rearing leave bill introduced in the Senate a year ago, SB 1757. The earlier Senate bill provided tax credits to employers with less than twenty employees for providing parental leave. The credit, ranging from \$100 to \$500 depending on the length of parental leave, would have been granted against the employer's regular personal income tax or corporate tax for each employee provided with a child-rearing leave benefit.<sup>164</sup> Under SB 257, however, the tax credit provisions were deleted.

#### CONCLUSION

Employers must carefully plan policies affecting employees who are pregnant. One of the first steps should be an analysis of the statutes, regulations and case law of each state in which the employer operates. An employer must determine whether the state expressly treats pregnancy discrimination as unlawful sex discrimination, thereby providing a remedy parallel to Title VII. In addition, the employer must check whether a given state provides preferential treatment for pregnant employees, such as California, or whether the state requires pregnancy to be handled like any other "disability."

Equally important, employers must also analyze their policies in light of Title VII's mandate to treat pregnancy-related disabilities in the same manner as other disabilities. Thus, employers always must be prepared to prove the neutrality of their pregnancy-related policies and decisions. As demonstrated by many of the cases reviewed above, neutrality can be difficult to establish, particularly when a benefit is denied a pregnant employee, or an adverse action taken. In short, an employee's pregnancy dictates a cautious but evenhanded human relations approach.

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163. *Id.*

164. SB 1757, § 2 (Torres) (1987-88 Sess.).